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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARQUETTE ANTONIO SHELTON,

Defendant and Appellant.

B216443

(Los Angeles County
Super. Ct. No. BA339715)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Steven R. Van Sicklen, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Marquette Antonio Shelton of attempted premeditated murder while discharging a firearm, possession of a firearm by a felon carrying a concealed weapon and assault with a firearm. Shelton appeals, challenging the sufficiency of the evidence of intent to kill to support the attempted murder conviction and the sufficiency of the evidence to support the jury's finding that the attempted murder was willful, deliberate, and premeditated.¹ We affirm.

BACKGROUND

Eyewitness Isaac Coulibaly

On April 27, 2008, at approximately 2:00 a.m., Isaac Coulibaly stood on the sidewalk with some friends outside an afterhours nightclub in Hollywood waiting for the club to open. Standing close to Coulibaly, also waiting for the club to open, were Shelton, two other men, and a woman. One of the men in Shelton's group told Coulibaly to move out of the way. Coulibaly moved forward to let the man pass and as the man walked behind Coulibaly he asked Coulibaly's female friend "[w]hat the fuck is the problem?" Coulibaly asked the man the same question. The man responded, "[w]hat the fuck you say, nigger?" Coulibaly told the man not to speak to him like that. One of the men in Shelton's group punched Coulibaly in the mouth. The punch propelled Coulibaly into the man with whom he had had words and this man punched Coulibaly as well. A fight erupted and the others in Shelton's group joined in with three or four men punching and kicking Coulibaly. During the fight one of the men yanked a chain off Coulibaly's neck.

According to Coulibaly, while Shelton's companions were still beating him, Shelton walked over to where Coulibaly's female friend and her friends were arguing with a woman, and hit Coulibaly's friend on the head with a gun, causing the gun to discharge. He did not see his friend get hit but he did hear the gun shot. When the men

¹ Shelton raises no issue with respect to his other convictions.

stopped beating Coulibaly, he got up and staggered over to his female friend who was now sitting on the curb. Coulibaly put himself between Shelton and his female friend. As Coulibaly explained it, “I pull out myself, and then I came to the lady. And the guy with the gun, he was there. And then I take the lady—and I stayed between the lady and him.” Approximately six to seven feet separated the two men as they stood and faced each other. Coulibaly estimated that the gunman “was in my face, I will say one minute, one minute and a half.” Shelton pulled out a handgun, pointed it at Coulibaly, and fired. The shot did not hit Coulibaly. Shelton repeatedly said, ““what, what, what, what?”” Coulibaly told Shelton to ““shoot me”” ““shoot me again.””

Police officers immediately arrived and shouted orders to ““drop the gun”” and ““get down.”” Shelton dropped the gun in the street and ran. The other men involved in the fight also ran. Police detained the men, including Shelton, at the scene.

Eyewitness Officer Daniel Cotti

On April 27, 2008, Los Angeles Police Department officers were conducting an undercover operation at the afterhours club. Officers were posted throughout the neighborhood in marked and unmarked cars and were in position by approximately 1:45 a.m.

Officer Daniel Cotti was in an unmarked truck parked directly across the street from the club. People began to arrive at the club at approximately 2:00 a.m. While waiting for the club to open some people waited by the entrance while others walked around. By 2:20 a.m. there were approximately 50 people waiting when workers opened the gate and went inside the club. People outside lined up near the gate preparing to enter.

A fight erupted with four men beating one man. The primary aggressor was a male Black in a red shirt. Shelton, who was wearing a blue and white striped shirt, and two or three other men were punching and kicking the victim. Cotti notified officers that a fight had broken out outside the club, that the victim, although he was landing punches,

was being very badly beaten and was about to be overwhelmed by the other men. Cotti requested assistance.

After the group stopped punching and kicking Coulibaly, he “stagger[ed]” off and “stumble[d]” out into the street toward three women standing near a car parked in the middle of the street. Shelton followed Coulibaly, the man in the red shirt followed Shelton. The man in the red shirt was “yelling and screaming at everybody” and people were “screaming” back and waving their arms. The man in the red shirt punched one of the females in the face. Shelton reached into his waistband, pulled out a handgun, and “punch[ed] it out towards them [Coulibaly’s group] with his right hand.” Cotti described the gesture of “punch[ing] it out” as taking the gun from the middle of his body and extending his arm straight out and parallel with the ground. Shelton pointed the gun directly at Coulibaly slightly “canted.” Cotti heard a gunshot. Cotti notified the other officers of “shots fired” and provided a physical description of Shelton as the shooter.

Cotti watched as Shelton ducked behind a car and put the handgun back into his waistband. Officers ran up the street with their weapons drawn and pointed at Shelton. The officers ordered him to stop. Shelton turned around, threw the gun in the street, and ran. The officers chased Shelton and detained him almost immediately.

Coulibaly identified Shelton as the shooter in a field show up. Police arrested Shelton and transported him to the station. Shelton’s hands tested positive for gunshot residue.

Cotti testified that he had only heard one gunshot, and that he did not see Shelton hit Coulibaly’s female friend in the head with the gun.

Officers retrieved the gun from the street where Shelton had thrown it. The gun was a nine-millimeter Glock. There were nine bullets in the magazine and one spent shell casing in the gun, meaning that the slide did not go back far enough to permit the shell casing to eject, which in turn prevented another round from being chambered and fired. Cotti opined that the slide did not go back far enough either because the slide was

too dirty to slide all the way back, or because Shelton had “limp-wristed it” and his hand had gotten in the way of the slide.

Defense

Trashawna Ardon, Shelton’s girlfriend, testified that she and Shelton arrived at the afterhours club at approximately 2:00 a.m. and stood in line waiting for the club to open. Coulibaly was standing in line with a female and two men. Coulibaly was arguing with a man in a red plaid shirt who was with a group of men. Coulibaly’s friends ran off when Coulibaly began fighting with the man in the red plaid shirt. Two other men joined the fight and hit and punched Coulibaly. One of Coulibaly’s friends ran back to the crowd congregated near the club, pointing and waving a gun and telling the men to stop fighting. Ardon detected a Jamaican accent when the man spoke. The man got closer to the people standing in line and talked and acted as though he was going to shoot them. Shelton tried to knock the gun out of the man’s hand and struggled with the man for control of the gun. During the struggle, the gun fired. The crowd scattered and police arrived. Police detained persons remaining at the scene, including Shelton and Ardon.

According to Cotti’s testimony, Ardon, when interviewed at the scene, was uncooperative and made no statements about the shooting. Ardon, however, testified that she identified herself as Shelton’s girlfriend and related her above version of the events to the female officer who handcuffed her. Ardon testified that Cotti had told her, “[y]ou better tell me everything that happened because I saw everything or you’re going to jail for a really long time.”

Procedural Background

An information charged Shelton with attempted, willful, deliberate, premeditated murder during which he personally and intentionally discharged a firearm (Pen. Code, §§ 664/187, subd. (a), § 12022.53, subds. (b) & (c); count 1)²; robbery (§ 211, § 12022.53, subds. (b) & (c); count 2); possession of a firearm by felon (§ 12021, subd. (a)(1); count

² All further statutory references are to the Penal Code.

3); carrying a concealed weapon on the person (§ 12025, subd. (a)(2); count 4); and, assault with a firearm while using a firearm (§§ 245, subd. (a)(2), 12022.5, subd. (a); count 5). The information alleged that Shelton had suffered multiple convictions within the meaning of the Three Strikes law (§§ 667, subds. (a)–(i), 1170.12, subds. (a)–(d)) and had served a prison term (§ 667.5, subd. (b)).

The jury acquitted Shelton of robbery but otherwise convicted him as charged and found true all special allegations. The court found true the allegations that Shelton had suffered multiple strike convictions and had served a prison term and sentenced him to an aggregate term of 50 years to life. He appeals from the judgment.

DISCUSSION

Standard of Review

Shelton contends the evidence that he acted with intent to kill Coulibaly was insufficient to support his conviction for attempted murder. He further contends the evidence was insufficient to support the jury’s finding that the attempted murder was willful, deliberate, and premeditated.

“In reviewing a sufficiency of evidence claim, the reviewing court’s role is a limited one. “The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citations.]

““Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s

credibility for that of the fact finder. [Citations.]” [Citation.]’ [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.)

Attempted Murder

Shelton contends the evidence of intent to kill was insufficient to sustain the attempted murder conviction. We disagree.

In order for a defendant to be convicted of attempted murder the prosecution has to prove that the defendant acted with specific intent to kill the victim. (*People v. Bland* (2002) 28 Cal.4th 313, 331; *People v. Lee* (2003) 31 Cal.4th 613, 623 [“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing”].) This requires a showing “that the assailant ““either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.’ [Citation.]” [Citations.]” (*People v. Smith, supra*, 37 Cal.4th at p. 739.)

A reasonable jury could infer that Shelton’s actions indicated an intent to kill Coulibaly. As Shelton faced Coulibaly from approximately six or seven feet away, Shelton reached into his waistband, pulled out a gun, pointed the gun directly at Coulibaly’s body, and fired. The act of firing a lethal weapon at a human being at close range reasonably indicates an intent to kill. (See *People v. Smith, supra*, 37 Cal.4th at p. 741 [“The act of firing toward a victim at a close, but not point blank, range ‘in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill’”].) When Shelton fired the gun and Coulibaly was not shot, Shelton said, ““What, what, what, what,”” which the jury could reasonably interpret as Shelton’s surprise that the bullet did not strike Coulibaly and further conclude that the surprise showed Shelton had expected his shot to strike Coulibaly.

That the expended shell casing failed to eject because Shelton may have “limp-wristed it” is irrelevant on the issue whether Shelton intended the gun to fire and intended the bullet to strike Coulibaly. (See *People v. Smith, supra*, 37 Cal.4th at p. 742 [“[n]or is the circumstance that the bullet misses its mark or fails to prove lethal dispositive—the

very act of firing a weapon “‘in a manner that could have inflicted a mortal wound had the bullet been on target’” is sufficient to support an inference of intent to kill’].) It is similarly immaterial whether Shelton held the gun “canted,” or at an angle, where the evidence showed that the barrel of the gun from which the bullet would be expelled was pointed directly at Coulibaly’s body.

Willful, Deliberate, Premeditated

Shelton also contends insufficient evidence supports the jury’s finding that the attempted murder was willful, deliberate, and premeditated. Again, we disagree.

“A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. (§ 189 [‘willful, deliberate and premeditated killing’ as first degree murder].) ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.] ‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

“Like first degree murder, attempted first degree murder requires a finding of premeditation and deliberation. . . . The three categories of evidence for a reviewing court to consider with respect to premeditation and deliberation are: (1) prior planning activity; (2) motive; and (3) the manner of killing.” (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223-1224, fns. omitted.)

Shelton was one of the three or four men punching and kicking Coulibaly. When the group stopped punching and kicking him, Coulibaly got up and staggered over to a car where his female friend was arguing with another woman. Shelton followed Coulibaly. The man in the red shirt followed Shelton. Shelton and Coulibaly stood facing each other approximately six feet apart. They remained standing in this position for as long as a minute or a minute and a half, after which Shelton reached into his

waistband, extracted a handgun, swung it out parallel to the ground, pointed it at Coulibaly, and fired the weapon.

Although perhaps not overwhelming, substantial evidence supports the jury's finding that Shelton had deliberated and premeditated before he shot at Coulibaly. Planning activity is shown by the evidence that Shelton pursued Coulibaly after the fight had ended and then stood facing Coulibaly for at least a minute before drawing his weapon, aiming it at Coulibaly's body, and firing it. The manner of the shooting, firing at Coulibaly's body at close range, also indicates calculation.

Shelton contends there was no evidence of planning and nothing to show that the shooting was anything more than a "rash, impulsive reaction . . . after a fight and a heated verbal exchange." But planning, motive, and manner of killing to show deliberation and premeditation are neither determinative nor exclusive. Even a "senseless, random, but premeditated, killing supports a verdict of first degree murder." [Citation.]” (*People v. Thomas* (1992) 2 Cal.4th 489, 519; see also *People v. Hawkins* (1995) 10 Cal.4th 920, 957 [an execution style killing was committed with such calculation, the manner of killing supported the jury's finding of premeditation and deliberation despite little or no evidence of planning and motive].) The jury was free to infer that Shelton's plan in pursuing Coulibaly after the fight ended was to kill him. (See, e.g., *People v. Halvorsen* (2007) 42 Cal.4th 379, 421 [the jury could have accepted the testimony that the defendant "hollered" to the victim, suggesting that the defendant had some purpose for calling the victim over before fatally shooting him].) The jury was also free to consider Shelton's staring at Coulibaly for, what was under the circumstances, a considerable length of time, indicated that Shelton must have considered the shooting beforehand, weighed the potential consequences, and after reflection nevertheless chose to fire his weapon.

Viewing the evidence, as we must, in favor of the prosecution, we conclude the record contains substantial evidence from which a rational juror could conclude that the

attempted murder was willful, deliberate, and premeditated. (*People v. Smith, supra*, 37 Cal.4th at pp. 738-739.)³

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.

³ Because we affirm the conviction for willful, deliberate, premeditated attempted murder, we need not consider Shelton's request that in the event of reversal we remand the matter to the trial court for reconsideration of his motion to strike his convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.